

Probationary and Trial Periods & Their Effect on Jurisdiction Before the MSPB

Defense Employee and Labor Relations Symposium

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Alex Thompson, Administrative Judge
U.S. Merit Systems Protection Board

The Statutory Language – Competitive Service

(a) For the purposes of this subchapter-

(1) “employee” means-

(A) an individual in the competitive service-

(i) who is not serving a probationary or trial period under an initial appointment; or

(ii) who has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less

The Statutory Language – Preference Eligible in the Excepted Service

- (B) a preference eligible in the excepted service who has completed 1 year of current continuous service in the same or similar positions-
- (i) in an Executive agency; or
 - (ii) in the United States Postal or Postal Rate Commission

The Statutory Language – Excepted Service (other than a Preference Eligible)

(C) an individual in the excepted service (other than a preference eligible)-

(i) who is not serving a probationary or trial period under an initial appointment pending conversion to the competitive service; or

(ii) who has completed 2 years of current continuous service in the same or similar positions in an Executive agency under other than a temporary appointment limited to 2 years or less

The Quandary:

The agency takes an action against an individual serving a probationary or trial period, but the individual has sufficient current continuous service to qualify as an “employee” under (A)(ii) or (C)(ii).

Does the individual have appeal rights to the Board?

The Difference

- **Employees**

- Property interest in job = 5th Amendment right to due process before deprived of property
- Procedural protections at 5 U.S.C. § 7513
- Appeal rights to the Board provided by statute

- **Non-“employee” Probationers**

- No property interest in job
- Regulatory procedural protections at 5 C.F.R. § 315.805 only if terminated for pre-appointment reasons
- Limited appeal rights to the Board provided by regulation

In The Beginning . . .

- Competitive Service
 - *Pervez v. Department of the Navy*, 193 F.3d 1371 (Fed. Cir. 1999)
 - *Rochniak v. Department of the Navy*, 10 M.S.P.R. 603 (1982)
- Excepted Service
 - *Forest v. MSPB*, 47 F.3d 409 (Fed. Cir. 1995)
 - *Kane v. Department of the Army*, 60 M.S.P.R. 605 (1994)
 - *Taylor v. Department of the Navy*, 63 M.S.P.R. 99 (1994)

Then along came Monique . . .

- *Van Wersch v. Department of Health and Human Services*, 197 F.3d 1144 (Fed. Cir. 1999)
 - Nonpreference eligible employee
 - Temporary excepted service appointment pending conversion to the competitive service
 - Never converted
 - Terminated almost 2 years and 8 months after original appointment

Falling within the Quandary

- Nonpreference eligible in the excepted service – 5 U.S.C. § 7521(a)(1)(C)
 - (i) who is not serving a probationary or trial period under an initial appointment pending conversion to the competitive service - **No**
 - (ii) who has completed 2 years of current continuous service in the same or similar positions in an Executive agency under other than a temporary appointment limited to 2 years or less - **Yes**

Resolving the Quandary

- “The question before us, then, is whether an individual who is excluded under subsection (i), such as Ms. Van Wersch, nevertheless is an ‘employee’ if he or she meets the criteria of subsection (ii).”
 - If the language of the statute is clear, the plain meaning will be regarded as conclusive.
 - Plain meaning of “or” is disjunctive.
 - Legislative history: excepted service personnel in probationary or trial positions pending conversion should not have the right to appeal.

The Winner: Van Wersch!

- Government's reading ignores the "meaning of the word 'or' that the dictionary, common sense, and the experience of life all bring to us."
- Nothing unreasonable or absurd about denying appeal rights to probationers but granting appeal rights to individual with 2 years of current continuous service, even if that individual is serving a probationary period
- Note to Congress: If this is not what you intend, you must amend!

But what about the competitive service?

- *McCormick v. Department of the Air Force*, 307 F.3d 1339 (Fed. Cir. 2002)
 - Originally appointed to career-conditional position with HHS in June 1991
 - Completed probation in original position
 - Requested voluntary change to position of Contract Negotiator with the Air Force
 - Appointed August 1999 subject to 1-year probationary period
 - Terminated February 2000

Falling within the Quandary

- Competitive Service – 5 U.S.C. § 7511(a)(1)(A)
 - (i) who is not serving a probationary or trial period under an initial appointment – **No**
 - (ii) who has completed 1 year of current continuous service under other than a temporary appointment limited to 1 year or less - **Yes**

Majority Report

- Majority considered itself bound *Van Wersch*
- No basis for a different result when construing language of subsection (A)
- Both subsections provide two definitions separated by “or”
- Government’s invitation to overturn *Van Wersch* must be addressed to *en banc* court
- *Pervez* not controlling – did not interpret the subsection as a whole

Dissenting Opinion

- *Van Wersch* is of no significance – addressed excepted service employees
- *Pervez*, not *Van Wersch*, is the controlling precedent
 - *Pervez* interpreted same subsection as *McCormick*; *Van Wersch* interpreted different subsection
 - While *Pervez* did not directly address (A)(ii), panel could not have reached result if it interpreted the relevant language in the way *Van Wersch* did

How literally should I read the statute?

- *Johnson v. Department of Veterans Affairs*, 99 M.S.P.R. 362, *review dismissed*, 161 F. App'x 945 (Fed. Cir. 2005)
 - TAPER employee appointed May 18, 2003 – not required to serve a probationary period
 - Terminated October 21, 2003 for misconduct
 - AJ ruled that appellant was an “employee” under § 7511(a)(1)(A)(i) and reversed termination on due process grounds
 - **Board – appeal rights of an individual who is not required to complete a probationary period are governed exclusively by § 7511(a)(1)(A)(ii)**
 - But never tested in the Federal Circuit post-*McCormick*

A Loophole . . .

- *Ramos v. Department of Justice*, 94 M.S.P.R. 623 (2003)
 - Originally appointed as a Border Patrol Officer in 1998
 - Selected from a register and appointed to a position as a Deportation Officer subject to a 1-year probationary period effective March 11, 2001
 - Terminated June 29, 2001
 - AJ dismissed for lack of jurisdiction
 - Board affirmed as modified
 - Appellant signed a Probationary Period Agreement acknowledging that adverse and disciplinary actions would be processed IAW 5 C.F.R. part 315
 - An appellant may waive a statutory right of appeal by accepting a new position subject to a probationary period

. . . Closed!

- *Rev'd and remanded*, 240 F. App'x 409 (Fed. Cir. May 18, 2005) (NP)
 - DOJ rejected the contract waiver theory and confessed error on behalf of the Board
 - DOJ conceded that under *McCormick*, Ramos enjoyed “full panoply of rights afforded tenured employees”
 - DOJ conceded that Ramos did not knowingly waive appeal rights
 - Court agreed that the Board erred in failing to apply *McCormick* and remanded for rulings on the merits

Other Waiver Cases

- *Hughes v. Social Security Administration*, 99 M.S.P.R. 67 (2005)
 - Probationary period agreement signed 2 months after the appellant was appointed to the position was invalid for lack of consideration
- *Payano v. Department of Justice*, 100 M.S.P.R. 74 (2005)
 - MOU which did not state that the appellant waived appeal rights he otherwise possessed did not constitute a valid waiver
- *Thompson v. Department of the Treasury*, 100 M.S.P.R. 545 (2005)
 - Virtually identical to *Hughes*.
- *Chavies v. Department of the Navy*, 104 M.S.P.R. 81 (2006)
 - Executed form acknowledging probationary status ≠ waiver of appeal rights
- Potential Prohibited Personnel Practice or illegal Employment Practice to condition selection on the applicant's waiver of appeal rights?

Other Factors

Current Continuous Service

- 5 C.F.R. § 752.402(b) – “a period of employment or service immediately preceding an adverse action in the same or similar positions without a break in Federal civilian employment of a workday”
- Service **need not be performed in the same agency nor in the same line of work** to qualify as current continuous service. *Dade v. Department of Veterans Affairs*, 101 M.S.P.R. 43, ¶ 10 (2005)
- “**Same or similar positions**” language does not apply to positions in the competitive service. *Porter v. Department of Defense*, 98 M.S.P.R. 461, ¶ 10 (2005)

Current Continuous Service Cont'd.

- Includes periods in a **nonpay status** consistent with the terms of intermittent or seasonal employment. *Jolivette v. Department of the Navy*, 100 M.S.P.R. 216, ¶ 10 (2005) (intermittent); *Pollak v. Department of the Treasury*, 99 M.S.P.R. 187 (2005) (seasonal); *Gutierrez v. Department of the Treasury*, 99 M.S.P.R. 141 (2005) (seasonal)
- Includes time when an employee is on **leave without pay**. *Gadsden v. Department of State*, 102 M.S.P.R. 79 (2006)

Other Factors

Same or Similar Positions

- Involve **related or comparable work** that requires the **same or similar skills**. *Mathis v. U.S. Postal Service*, 865 F.2d 232 (Fed. Cir. 1988) (“special delivery messenger” and distribution clerk are similar positions)
- “**Experience** in one position demonstrates the knowledge, skills, and abilities required to perform the other job.” *Burrell v. U.S. Postal Service*, 76 M.S.P.R. 204 (1997) (Postmaster and Supervisor, Building Services are not similar positions)
- **Skills** and **fundamental character** of both positions are closely related. *Coradeschi v. Department of Homeland Security*, 439 F.3d 1329 (Fed. Cir. 2006) (appellant nonfrivolously alleged that positions of INS agent and Federal Air Marshal were similar)

Other Factors

Completion of Probationary Period

- An individual completes a probationary period at the **end of his shift on the day before his anniversary date.**
Steinhoff v. Department of Veterans Affairs, 101 M.S.P.R. 443, ¶ 6 (2006)
- When does the appellant complete 1 year or 2 years of “current continuous service?” At the end of his shift or at the end of the day?

Other Factors

“Tacking”

- 5 C.F.R. § 315.802(b)
 - Prior service may count toward completion of probationary period if:
 - Rendered immediately prior to the career or career-conditional appointment or conversion
 - In the same line of work
 - In the same agency
 - No more than one break in service of less than 30 days
- In determining whether service is in the “same line of work,” the nature and character of the duties actually performed controls over the intent or job titles. *Sosa v. Department of Defense*, 102 M.S.P.R. 252, ¶ 12 (2006)
- “Tacking” applies to probationary periods in the excepted service as well as the competitive service. *McCrary v. Department of the Army*, 103 M.S.P.R. 266, ¶ 12 (2006) (Federal Career Intern Program)

Other Factors

Miscellaneous Cases

- *Greene v. Defense Intelligence Agency*, 100 M.S.P.R. 447, ¶ 12 (2005)
 - Current continuous service in “an” executive agency does not mean service in a single agency
- *Porter v. Department of Defense*, 98 M.S.P.R. 461, ¶¶ 14, 21 (2005)
 - The rule of *McCormick* is retroactive and must be applied to all pending cases, whether or not those cases involve predecision events
 - A decision to resign in lieu of termination may be involuntary where the agency misinforms the appellant regarding her appeal rights, even if the agency did not intend to deceive the employee